

## Assets As A Legal Subject In Efforts To Recover State Financial Losses In Corruption Crimes

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### Abstract

Corruption is a problem that results in high financial and economic losses in Indonesia. UNCAC has launched recommendations for countries to make arrangements regarding Non-Conviction Based asset Forfeiture (NCB) since 2003 which aims to recover maximum state financial losses. This is based on the fact that the state losses recovered are not proportional to the state financial losses incurred due to corruption crimes. The research used is normative juridical with a statutory approach, conceptual approach, and comparison with other countries. The conception of assets as legal subjects in the NCB is based on the theory of legal fiction where assets in their position as legal subjects make them seem "guilty" when the way of use or the process of obtaining them is against the law. Assets in this case are considered to be able to perform a legal act that can be accounted for as happened in several cases in the United States, the Philippines, Thailand, not to mention Indonesia. Thus, because it focuses on the "fault" of the object, asset forfeiture can still be carried out even though the object or asset has changed hands. Legislation in Indonesia has actually adopted the concept of NCB, but it does not fulfill the basic essence of the concept where the goal is to recover state losses arising from corruption maximally and quickly. Therefore, laws governing asset forfeiture must be made specifically to accommodate this, one of which is through the bill on asset forfeiture.

**Keywords:** Corruption, Return of state financial losses, Non-Conviction Based asset Forfeiture.

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## INTRODUCTION

Today, the emergence of various problems in the world that are increasingly complex causes humans to inevitably have to think of solutions in overcoming them. Whether in terms of economics, diplomatic, culture or in the realm of law. There are many problems in the realm of law that are still unresolved, one example of which is related to criminal acts. It should be noted that in this modern era a variety of new criminal offenses have developed which should also be accompanied by efforts to overcome solutive crimes through responsive legal policies rather than conservative ones. If we reflect on the application of crime prevention in Indonesia today, it still focuses on the retributive side of retaliation rather than restorative even though there has been a change in the legal paradigm where various countries have begun to abandon this concept. One example of the changes that have occurred is in the crime of corruption, which used to emphasize the concept of "follow the suspect" turning into "follow the money". This approach to "follow the money" can provide another view of efforts to eradicate corruption.

Indonesia already has rules in its positive law related to the crime of corruption either in the Criminal Code or laws outside the Criminal Code, namely Law Number 31 of 1999 concerning Corruption as amended by Law Number 20 of 2001. The regulation has embodied the definition of corruption which is a criminal act intended to obtain a good benefit obtained by unlawful means such as abusing one's position or trust. This definition is reinforced by the definition of corruption in the Black Law Dictionary published in the Corruption Crime module of the KPK (Waluyo, 2022). The Indonesian state through the government has basically tried to deal with corruption in Indonesia by categorizing corruption as an extraordinary crime and white

collar crime. In general, corruption cases that occur in Indonesia are resolved using criminal law because corruption is a form of a criminal offense. On the other hand, the obstacles that occur during the law enforcement process of corruption are the slow legal process and the possibility that assets or objects from the proceeds of corruption will be hidden, fled abroad, or changed into another form, making it difficult for law enforcement officials to track and return state assets that clearly harm state finances due to the actions of the perpetrators. In overcoming these problems, the government continues to strive to recover state financial losses (asset recovery) due to criminal acts of corruption by seizing assets through both criminal and civil legal channels.

The concept of asset forfeiture is fundamentally that if there is an indication of a benefit obtained illegally by a perpetrator/criminal/defendant, the asset must be reclaimed by the state because the asset belongs to the government and the people. Asset forfeiture in Indonesia itself can actually go through two channels, namely through criminal or civil channels. Basically, the rules of law that are specifically enforced to punish the perpetrators of criminal acts themselves use criminal law or criminal forfeiture. Criminal forfeiture itself recognizes the term "in personam action against the defendant, not an in rem action against the property involved in the offense" which means that the criminal law model is carried out in relation to the punishment of the perpetrator who is finally sentenced to a court decision with permanent legal force. Through the criminal law process, the state can carry out asset forfeiture against perpetrators who commit crimes with an evidentiary system in advance and can only be implemented if it has been legally proven to commit a criminal offense.

Asset forfeiture can not only be carried out through criminal law channels, but can also be carried out through civil law channels. If we refer to the civil law process, the legal basis for asset forfeiture (in rem) can only be carried out through the Law on the Eradication of Corruption which requires the public prosecutor to first prove the existence of state losses arising (Articles 32, 33, 34 and Article 38) (Saputra, 2017). Of course, this is a problem for the Indonesian state, which is synergizing to eradicate corruption. In addition, Indonesia as one of the member countries that ratified the UNCAC anti-corruption convention must be vigorous in its efforts to deal with increasingly rampant corruption cases.

The United Nations Convention Against Corruption (UNCAC) is the first anti-corruption convention that has become the legal basis for countries in the world to design an appropriate and comprehensive approach to preventing and combating corruption effectively (Transparency International, 2005). The Convention covers several forms of corruption such as bribery, abuse of functions/abuse of power, trading in influence, and various other corruption offenses. Not only regulates corruption crimes, but UNCAC also regulates efforts to deal with transnational corruption, there are also additional handling efforts referred to as asset recovery efforts against the proceeds of corruption. UNCAC itself has been adopted by the United Nations General Assembly (UN) through UN resolution 58/4 on October 31, 2003 (Skandiva, 2022). A total of 189 countries have signed the resolution as of November 18, 2021 including Indonesia which signed on December 18, 2003 and then ratified the convention on September 19, 2006 through Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption, (United Nations, 2003).

Asset forfeiture is one of the important efforts in the framework of state asset recovery initiated by UNCAC, so it is important for Indonesia as one of the countries that is part of the convention to have laws that specifically regulate asset forfeiture. In positive law, Indonesia itself actually has legislation in this area, namely through the Law on Corruption Eradication which has been in effect since the 90s. However, there are several important points that are considered to hamper the government in its efforts to restore state financial losses caused by corruptors such as asset forfeiture which is part of additional punishment, assets that are difficult to be recovered by the state optimally and intact and the concept of assets that cannot be used as a legal subject

in Indonesian positive law which aims to facilitate asset forfeiture so that special rules are needed to regulate this in the future (Fitriyani, 2023).

As we know that in the world of law today has recognized two legal subjects, namely humans (*natuurlijk persoon*) and legal entities (*rechtspersoon*) (Prananingrum, 2014). At the beginning of its development, the subject of law only recognized humans, but gradually global developments gave rise to a new legal subject, namely legal entities. This development proves that there is a possibility for the emergence of new legal subjects that will apply in the future, one of which has the potential to be the concept of assets as a legal subject. Global development also creates new things that are not predicted, one example of legal development that occurs is the creation of a new mechanism for asset forfeiture. Based on the explanation contained in the background above, the author wants to raise one problem formulation in this study, namely how is the concept of assets as a legal subject in an effort to recover state financial losses in corruption crimes?

## RESEARCH METHODS

The focus of this research is on the issue of the current regulation of asset forfeiture in Indonesia in its efforts to recover state financial losses in corruption crimes. The type of research used is normative juridical legal research using a statutory approach, then a conceptual approach to understand the views, concepts that develop in legal science and using a comparative approach by comparing the legal rules that apply in Indonesia with other countries (Marzuki, 2017). The legal material search technique used is through a literature study of legal materials to be used both (primary, secondary, and tertiary). Furthermore, the legal material analysis technique used is to use qualitative descriptive techniques with the aim of describing the legal problems faced and further analyzed based on the theory and legal materials obtained (Sugiyono, 2018).

## RESULT AND DISCUSSION

Asset forfeiture without punishment is a method that is considered effective in an effort to restore state financial losses arising from the actions of perpetrators of corruption crimes. In the Asset Forfeiture Bill, it has actually been stated that this can be done without waiting for a permanent legal verdict. This paradigm has basically been applied in many other countries under another name Non Conviction Based asset Forfeiture (NCB). This system was a new breakthrough in its time which was initially embodied in the UNCAC convention in 2003. NCB itself is a system where asset forfeiture is carried out against an object from the proceeds of crime by conducting a civil lawsuit. The mechanism in the NCB system can be done by suing the assets of a crime, not suing the perpetrator of the asset owner. The mechanism is reinforced by the definition of NCB explained by one of the legal figures, Theodore S. Greenberg, who stated that NCB is based on the Taint Doctrine theory where assets deemed tainted by criminal acts can be seized and returned to the state so that what is pursued is not the perpetrator of the crime but the asset.

Asset forfeiture is the forced return of assets or property by the government that is deemed to be related to a criminal offense. For example, there are several methods of asset forfeiture that have developed in common law countries such as the United States: criminal asset forfeiture, administrative asset forfeiture, and civil asset forfeiture (How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement, 2018). Criminal asset forfeiture is carried out through criminal justice channels where in the process it will be proven whether the defendant is actually proven to have committed a crime.

Furthermore, administrative asset forfeiture is a method of asset forfeiture where it is possible for the state to take over assets without involving judicial institutions. Meanwhile, civil asset forfeiture is a property or asset forfeiture that places a lawsuit against the property or asset, and not against the perpetrator of the crime. Therefore, property or assets can be forfeited even if the criminal justice process against the offender has not been completed (The United States Department of Justice (2022)). Civil forfeiture is easier to implement and is very beneficial to the state because it does not require many requirements.

According to Mardjono Reksodiputro, asset forfeiture can be carried out in three ways, namely:

- a. Criminal forfeiture, which is commonly known through the confiscation of certain goods and if it turns out that the goods are a tool used by the defendant in committing a crime with a legally binding criminal decision, the goods are confiscated for the state;
- b. Administrative forfeiture, this forfeiture is contraband in nature, where the executive (government) is given the right by law to immediately seize goods without going through a trial;
- c. Civil forfeiture, known as the forfeiture of war-torn property, as well as the forfeiture of "orphaned" property (Porajow, 2013).

Non-Conviction Based Asset Forfeiture is one of the effective ways to seize assets resulting from crime. In the common law legal system, two types of asset forfeiture are recognized, namely:

- a. Ordinary common law forfeiture;
- b. Statutory forfeiture.

Ordinary common law forfeiture operates following a court judgment for a serious crime. Ordinary common law forfeiture is a form of in personam forfeiture, hence forfeiture can be made against all property owned by the convicted person after a court decision. Statutory forfeiture is the opposite, where it is imposed without the need for a court decision, but only limited to the property used in committing the crime or also known as civil in rem forfeiture.

The provisions on NCB or asset forfeiture without conviction are based on several international agreements that have been approved by various countries such as Article 54 number 1 letter C of UNCAC 2003, Article 12 of UN-CATOC, and the Financial Action Task Force (FATF) Revised 40+9 Recommendations. These international treaty agreements have basically become a reference for several countries in the world to apply the values of these treaties in asset forfeiture arrangements in their respective countries. One of the countries known as the pioneer country of the creation of NCB is the United States. If we trace the history of the United States in the use of NCB, the United States adopted at least three types of NCB use models, including deodand, forfeiture of estate, and commercial forfeiture. These three models continued to develop until finally in the year 2000 where the term NCB was recognized from the birth of the Crime Control Act and Civil Asset Forfeiture Reform Act (CAFRA). The Civil Forfeiture system itself was initially used only on a domestic scale when the state found an asset or property of the perpetrator of a criminal offense who had died to be confiscated from the proceeds of the crime but could not be proven who the perpetrator was. One example of the use of NCB in the United States in the past was during the case of *J.W.Goldsmith, JR-Grant v. United States* where the Supreme Court explicitly adopted the fiction of personhood and rejected the due process claim of an innocent owner (Hauert, 1994).

The development of NCB in the United States did not stop there. There was a major legal resolution with the passing of the USA Patriot Act in 2001. The enactment of the Patriot Act became the legal basis for civil lawsuits to confiscate assets from criminal acts committed inside and outside the country. In addition, the Patriot Act also became the first legal basis for pre-seizure when the foreign court process is still ongoing. Further legal arrangements regarding the

enforcement of NCB are also basically regulated in the Patriot Act, but there are two initial options in the implementation of asset forfeiture including obtaining a letter from a judge or waiting for a referral from the court for an in rem arrest warrant in court (Department of Justice, 2008). One example of asset forfeiture that has occurred in the United States using an in rem forfeiture mechanism which uses an unusual name such as in the case of "United States V. \$160,000 in U.S Currency" or "United States V. Contents of Account Number 12345 at XYZ Bank Held in the name of Jones". In the process, America uses the theory of legal fiction where assets are basically legal objects, but in the mechanism can turn into legal subjects. Assets in this case are considered to be able to perform a legal action that can be accounted for. The verdict in the case can occur because the concept of in rem forfeiture has existed in America as a history in the eighteenth century where America has given names to contraband assets of pirate ships or slave smuggling ships when the owners are outside America which cannot be charged by American law (Saputra, 2017).

The development of the NCB legal system does not only apply in America, one of the countries in Southeast Asia that applies the concept of NCB is the Philippines and Thailand. The use of NCB in the Philippines can be said to be quite new but has good effectiveness and is considered as one of the important legal instruments in fighting corruption and money laundering in the country. Courts in the Philippines can be requested to use the in rem procedure to trace assets of wealth from a crime. However, to be able to apply for NCB procedures in the Philippines, three main conditions must be met, including the first is that the funds must be frozen by the appellate court, there is a covered transaction report, and it can only be applied for in money laundering cases with financial intermediaries. The rules regarding NCB in the Philippines are set out in the Rules of Procedure in Cases of Civil Forfeiture in 2005. One of the notable legal cases that utilized NCB in the Philippines is the case of the return of former Philippine President Ferdinand Marcos' criminal assets in Switzerland. The enforcement of NCB in the case did not go smoothly at first because Marcos' wife filed a lawsuit for the annulment of the NCB, but the Philippine court insisted on using the NCB in rem litigation because the judge said that the rules on the matter were already firmly established in Philippine positive law.

Thailand has also committed to eradicating corruption by establishing a law based on The Constitution of The Kingdom of Thailand Section 301 which contains a corruption eradication agency called The National Counter Corruption Commission (NCCC). This institution basically has the authority to be able to check the wealth of politicians or government officials, investigate cases related to the prosecution of the dismissal of state officials, as well as the criminal cases of these officials. In addition to these institutions, Thailand itself has established an institution that is specifically authorized to handle all asset forfeiture issues comprehensively. In addition, the institution was created with the aim of increasing the work intensity of the authorities in handling asset forfeiture cases and also to be free from bribery by corruptors to save their illegal assets (Transparency International, 2004). This system can basically be an example and can be applied to the Indonesian legal justice system constructively and systematically. In Thailand, NCB has been regulated first in Anti Money Laundering Act B.E. 2542 - AMLA of 2019 as amended by Anti Money Laundering Act (No.4) B.E. 2556 (2013), AMLA itself consists of 66 Section and 8 Chapter. In addition to these regulations, there are implementing regulations such as Ministerial Regulations issued with reference to the provisions of the AMLA, including those related to transactions and identifying customers, then related to seizure and binding of property, revocation of binding on property and so on (Anti-Money Laundering Office, 1999). The NCB in Thailand is run by the Anti Money Laundering Office (AMLO) which has the responsibility of investigating money laundering crimes and is competent in conducting asset forfeiture such as NCB. The Anti Money Laundering Office (AMLO) itself has broad authority to identify, trace, locate, detain, confiscate, and manage seized assets. In addition, AMLO has developed the

AMCATS software system that allows it to work transparently and accountably by recording and tracking data related to asset forfeiture. Therefore, AMLO can work better in managing assets, generating reports, analyzing statistics, accounting for its inventory and monitoring asset management costs (Ayuningsih, 2023).

In practice, the NCB Asset Forfeiture method is not only developed and applied in other countries, but the use of NCB has also indirectly occurred in several cases in Indonesia. Examples of these cases are as follows (Muntahar, et al, (2021).

**a. Republic of Indonesia vs. assets in the form of money amounting to Rp. 1,000,000,000.00**

The beginning of this case was related to a narcotics crime handled by the National Narcotics Agency (BNN) against suspects Salahuddin, et al who were customers at BCA Bank and had been designated by the government as DPO (Wanted Person List). The Batam District Court granted the request of the East Java Provincial BNN so that assets belonging to criminals related to narcotics cases can be executed in Batam Province. The suspect Salahuddin transferred funds with a nominal value of Rp. 1,000,000,000.00 (one billion rupiah) addressed to PT Marinatama Gemanusa. The amount of money in the stipulation of asset forfeiture is declared as the proceeds of money laundering and is legally declared to be part of the state assets because it is proven to come from prohibited acts (narcotics crime).

**b. Republic of Indonesia vs. assets in the form of money amounting to Rp. 4,893,141,137,**

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The next case to be discussed is related to fraud or data falsification at Bank BJB Bogor. The NCB method was carried out when the criminal process was underway, namely at the investigation stage due to the perpetrators who were difficult to find but at the same time the financial stability of the state would be disrupted if the seizure of assets taken by the suspect Nindy Helsa was not immediately carried out. The suspect is charged with fraud and/or forgery and money laundering as referred to in Article 378 of the Criminal Code and/or Article 283 of the Criminal Code and Article 3 and/or Article 5 of the PPTPPU Law. The “modus operandi” carried out by the suspect was to forge an Identity Card (KTP) and Curriculum Vitae (CV) document using the name Dwi Trada Prima to open an account at Bank BJB Bogor Branch. Then the account he created was used to receive foreign exchange shipments from Al Finar General Trading Co. LLC. with the address Abdul Rasaq BLDG, salam street POB. 3865 ATT, Reconciliation Div, Abu Dhabi UAE amounting to USD 409,982.50 or equivalent to Rp. 4,893,141,137, -.

Some of the evidence that has been found is:

1. Administrative checks at the Bogor District Population and Civil Registration Office revealed that the suspect was using an unregistered or fake ID card in the name of Nindy Helsa.
2. The Integrated Licensing and Investment Service Agency (BPPTPM) stated that it did not issue a Business Location Permit (SITU) in the name of CV. Dwi Trada Prima so the SITU can be concluded to be incorrect.
3. There was a rejection of the book transfer by Bank Jabar Bogor Branch of the funds that were successfully transferred from the applicant.
4. The transfer funds are still intact at Bank Jabar Bogor Branch because no one has made a claim, also the suspect a.n Nindy Helsa's whereabouts are unknown.

**c. Republic of Indonesia vs. assets in the form of money amounting to AUD 642,000**

This case relates to the seizure of assets from corruption offenses on behalf of the suspect Hendra Rahardja which was handled by the Indonesian Government with the assistance of Australian authorities. In this case the principle of in absentia was used. The Supreme Court still stated that asset forfeiture in absentia was still justified and was confirmed by an appeal decision through the DKI Jakarta High Court. The return of the suspect's assets was carried

out through a fairly long process and in the end the Indonesian Government has succeeded in seizing assets totaling AUD 642,000. In the process of returning these assets, the Government of Indonesia formed an Integrated Team for Finding Convicts and Suspects of Corruption. Although Indonesia and Australia have an extradition and Mutual Legal Assistance (MLA) agreement in terms of returning assets from corruption in the Hendra Rahardja case, it does not necessarily guarantee a smooth extradition process and return of assets from corruption. Assets owned by Hendra Rahardja in Australia and Hong Kong cannot necessarily be returned immediately (Husein, 2019).

Regarding the reason why the asset forfeiture regulation has not been legalized until now, there are actually several factors that have become obstacles. First, from the aspect of the legislative process, the asset forfeiture bill has a small chance of being finalized in the last year of the 2019-2024 DPR period due to the limitation for commissions in the DPR to discuss a maximum of two bills in one year. Currently, Commission III of the House of Representatives, which is responsible for the Asset Forfeiture Bill, is discussing the Civil Procedure Law Bill and the Narcotics Bill. Thus, the Asset Forfeiture Bill will only be discussed if one or both of these bills are completed (Pusat Studi Hukum dan Kebijakan Indonesia, 2023). Second, there is the political problem that the majority of all DPR members must approve on the bill. However, because the DPR contains various factions that have their own interests, of course this will be rather difficult to achieve. Third, politically, the asset forfeiture bill is a sensitive issue because it involves matters of law, justice and power, so there are concerns about abuse of authority or protection of individual rights. Finally, there is a significant paradigm shift in the Asset Forfeiture Bill where first, the party charged is not only the perpetrator of the crime, but also the assets obtained from the crime, secondly the mechanism used is civil justice, and third is that the court decisions are not subject to criminal sanctions as imposed on other criminals. Therefore, the asset forfeiture bill is quite complex and will require qualified expertise to identify assets that will be sued to prove that these assets are related to other assets when the bill has been passed (Indonesia Corruption Watch, 2023).

Even so, it does not rule out the fact that the level of urgency of the concept of assets becoming a legal subject in an effort to recover state financial losses through asset forfeiture bills still considered very important. If we reflect on the theory of legal fiction, assets in their position as a legal subject make it seem as if they are "guilty" when using them or obtaining them against the law (Direktorat Hukum, 2021). Thus, because it focuses on the "guilt" of the object, asset forfeiture in rem can still be carried out even though the object obtained from unlawful acts has changed hands. Examining the application of the NCB conception of asset forfeiture in Indonesia, it can refer to the concept of in rem forfeiture contained in articles 32, 33, 34, 38 of Law Number 31 of 1999 concerning the Eradication of Corruption as amended by Law no. 20 of 2001 (Anti-Corruption Law) which can be carried out when criminal efforts are no longer possible in an effort to recover state losses because there is insufficient evidence, the defendant or suspect dies, is acquitted, or there are allegations of corruption proceeds that have not been confiscated by the state even though there is an "inkracht" court decision. On the other hand, the application of NCB in Indonesia is not as smooth as imagined, there are challenges in its application, such as the untouched NCB regulations in Indonesia. There are several important things that have not been regulated in Indonesian law, such as in cases where the suspect cannot be found, the suspect escapes, there are no experts who can provide information about the inheritance in a civil lawsuit, which in essence the state has suffered losses due to these things, while the assets are also not included in the criminal confiscation. These problems in fact can only be resolved through the civil law process, therefore this is one of the important urgencies so that NCB can be immediately enforced in Indonesia through the Asset Forfeiture Bill.

## CONCLUSION

The asset forfeiture mechanism has been regulated in such a way through positive law in Indonesia. Where it can be through two channels, the first can be through criminal prosecution. Second, through a civil lawsuit as written in the Law on Criminal Acts of Corruption. The application of in rem forfeiture has basically been carried out by various countries, including Indonesia. However, the existing articles in the Law on Criminal Acts of Corruption are not able to fully restore state financial losses caused by corruption. The positive legal system in Indonesia basically has a basis for asset forfeiture for corruption crimes, but the mechanism implemented to date still uses the criminal law judicial system first (in personam forfeiture) which takes a long time and asset forfeiture is only included in the additional punishment. Effective asset forfeiture in Indonesia can essentially be carried out if a new legal paradigm is used, namely the use of a Non-Conviction Based asset Forfeiture mechanism where assets can become "subjects of law" when their use or how to obtain them is against the law based on the theory of legal fiction. Based on the author's analysis, the use of Non-Conviction Based Asset Forfeiture has excellent potential and can be beneficial in law enforcement and the recovery of state financial losses. Therefore, the author suggests that special regulations regarding asset forfeiture in Indonesia using the Non-Conviction Based Asset Forfeiture mechanism should be ratified immediately to facilitate the return of state financial losses arising from corruption.

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